BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANCES K. LENHART	)	
Claimant	)	
VS.	)	
	)	Docket No. 159,327
KOSS CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
UNITED STATES FIDELITY & GUARANTY CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the Award entered by Administrative Law Judge Alvin E. Witwer on March 22, 1996.

APPEARANCES

Claimant appeared by her attorney, James M. Sheeley of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Patricia A. Wohlford of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties have also stipulated that claimant last worked for respondent on October 13, 1990. Accordingly, the claimant alleges personal injuries by accidents by way of a series continuing through October 13, 1990, that being the last day claimant worked for respondent. Stipulation 1 in the March 22, 1996, Award is revised accordingly.

ISSUES

Claimant contends the Administrative Law Judge erred in finding claimant failed to prove by a preponderance of the credible evidence that: (1) claimant sustained personal injury or injuries by accident or accidents during the time period claimed; (2) claimant's bladder problems and other health problems arose out of and in the course of her employment with respondent; (3) claimant provided respondent with proper notice of accident and that respondent was prejudiced by such alleged lack of notice; and (4) claimant's Application for Hearing, filed with the Division of Workers Compensation on October 10, 1991, was filed more than one year after her last day of employment with respondent and, therefore, written claim for compensation was not timely.

Claimant appealed those findings and asked the Appeals Board to enter an award in favor of claimant and against respondent for permanent partial disability compensation based upon the 20 percent whole body impairment of function rating by Barry W. Galbraith, D.O.

Claimant also seeks review of the Administrative Law Judge's assessment to claimant of the $100 charge made by Dr. Koprivica for the missed appointment.

Claimant further contends the Administrative Law Judge exceeded his jurisdiction in ordering an independent medical examination and therefore, the opinions of P. Brent Koprivica, M.D., should not be considered.

Respondent, at oral argument to the Appeals Board, stated that all issues before the Administrative Law Judge remain issues for determination by the Appeals Board. Therefore, the issues are:

(1) Did claimant meet with personal injury or injuries by accident or accidents during the time period alleged?

(2) Did claimant's alleged injury or injuries arise out of and in the course of her employment with respondent?

(3) Did respondent have timely notice of claimant's alleged accident and, if not, was respondent prejudiced by such lack of notice?

(4) Did claimant timely serve written claim for compensation upon respondent?

(5) Is claimant entitled to any future medical treatment at the expense of the respondent and insurance carrier?

(6) Is claimant entitled to be paid the sum of not more than $350 by the respondent and its insurance carrier for unauthorized medical expense?

(7) What is the period of temporary total disability and is the claimant entitled to compensation therefor?

(8) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From April 1990 until October 13, 1990, claimant was a roller operator for respondent on a road building crew outside Troy, Kansas. As a roller operator, claimant's function was to prepare ground for the laying of concrete. Claimant worked out ahead of the concrete-pouring part of the road-building operation. She worked approximately one to three miles ahead of the paving crew. Claimant alleges her bladder injury occurred as a result of inadequate restroom facilities. The only facilities available were the portable facilities placed at various locations along the several miles of road construction. Claimant alleges that during the course of her employment, respondent failed to transport her on a regular, timely basis to the restroom facilities and, consequently, claimant suffered a distended bladder. This condition caused incontinence, pain, and other problems.

(1) Date of accident.

The Administrative Law Judge found claimant's date of accident to be the last day she worked for respondent. The Appeals Board agrees with the analysis of the Administrative Law Judge. The finding of date of accident to be the last day worked is consistent with the Court of Appeals holding in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). However, the Administrative Law Judge was operating under the mistaken impression that claimant's last day worked was October 6, 1990. The parties now agree that claimant last worked for respondent on October 13, 1990. Therefore, the Appeals Board finds October 13, 1990, to be the accident date.

(2) Personal injury by accident.

The Appeals Board further finds that claimant's distended bladder condition and the resulting incontinence problem is the result of personal injury by accident.

> "'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act

> that the employer bear the expense of accidental injury to a worker caused by the employment." K.S.A. 1990 Supp. 44-508(d).

The essence of claimant's claim is that the repeated delay in being afforded a restroom break and access to appropriate facilities had the cumulative effect of causing her distended bladder condition. The injury is the physical change in the body which occurs as a result of the accident. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 573 P.2d 1025 (1978). Claimant's physical condition changed during and immediately following her employment with respondent. Any damage or lesion in the physical structure in a worker causing harm may be personal injury if it occurs under the stress of usual labor. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). The accident is the event which causes the injury. An accident can occur when, as a result of an employee doing her usual tasks in the usual manner, the employee suffers injury. Demars, *supra*. Claimant's accident was not the result of a single event or trauma. Rather, it resulted from a series of events which occurred over time. The usual tasks which she performed required that she be out-of-doors and away from regular restroom facilities. The respondent's repeated delays in affording claimant appropriate restroom facilities were the events that caused claimant injury and, hence, were accidents within the meaning of the Workers Compensation Act.

(3) Notice and prejudice.

Claimant testified that while she was working on the road project the porta-potties would be anywhere from one-quarter mile to five miles away from her. She could not drive her roller machine on any finished dirt, concrete, or bridges. Claimant further testified that the scraper operator would not give her a ride to the restroom facility and Mr. O'Dell admitted that on at least one occasion claimant had advised him of this. According to claimant, on a daily basis she requested that her superintendent and/or foreman check with her more frequently because she was not getting to the restroom facility often enough. She further testified that she had advised both the superintendent and her foreman on several occasions that her back was hurting her and that her stomach was becoming painful, but the only response she received was that it was from the vibration of her roller machine and she should not worry about it.

The project superintendent, Robert O'Dell, testified that he could only recall one occasion where claimant complained about her stomach hurting. He asked whether she was injured and when claimant replied in the negative, she was told that respondent would not send anybody to the doctor unless they are injured.

Having found that claimant's condition meets the statutory definition for accident within the meaning of the Workers Compensation Act, the Appeals Board must now consider whether claimant gave respondent timely notice of accident. K.S.A. 44-520 (Ensley) provides:

> "Notice of injury. Proceedings for compensation under the workmen's compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, shall have been given to the employer within ten (10) days after the date of the accident: *Provided*, that actual knowledge of the accident by the employer or his duly authorized agent shall render the giving of such notice unnecessary: *Provided further*, That want of notice or any defect therein shall not be a bar unless the employer prove [sic] that he has been prejudiced thereby."

Notice of accident does not mean notice of injury. The fact that claimant did not know the nature of her injury does not defeat her claim. Claimant described the trauma that led to her injury to her supervisors. That trauma consisted of the prolonged period of time between claimant being given access to restroom facilities. In addition, claimant described the symptoms that were occurring as a result of this trauma, namely the back and stomach pain. Claimant testified to giving respondent notice of these problems and concerns on an ongoing basis. Accordingly, the Appeals Board finds timely notice of accident was given.

(4) Written claim.

K.S.A. 44-520a(a) (Ensley) provides:

> "(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation . . . ."

Furthermore, K.S.A. 44-557(c) (Ensley) provides:

> "No limitation of time in the workmen's compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced before the director within one (1) year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto."

Claimant alleges that she served written claim on her employer on or about October 8, 1991. The Administrative Law Judge found that claimant's Application for Hearing was filed with Division of Workers Compensation on October 10, 1991. Respondent does not dispute that finding, but argues that its time for filing a report of accident was extended due to lack of notice of accident from claimant. As above noted, the Appeals Board finds timely notice was given. Therefore, the employer failed to timely file a report of accident and, accordingly, claimant's time for making written claim upon the employer was extended to one year from the date of accident. The Administrative Law Judge found claimant did not file written claim within one year of her last date worked because he found that claimant's last day was October 6, 1990. However, as claimant's last day worked is now agreed to have been on October 13, 1990, the written claim issue is resolved in favor of claimant.

(5) Accident arising out of and in the course of employment.

Arising out of the employment and in the course of employment are separate elements. Claimant must prove both in order for her claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

An injury arises "out of" the employment if it arises out of the nature, conditions, obligations, and incidents of the employment. Only risks associated with the workplace are compensable. Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980). Claimant's work activities required her to be away from restroom facilities. The risk of injury associated with the delay in getting to the restroom facilities is one which claimant would not have been subjected to had she not been working. Therefore, it is a risk associated with the employment.

"In the course of" employment relates to the time, place, and circumstances under which the accident occurred. This phrase means that the injury happened while the employee was at work in her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984). There is no question but that claimant was in her employer's service while on the job site performing road work. Accordingly, the Appeals Board finds that claimant has met her burden of proving personal injury by accident arising out of and in the course of employment with respondent.

As to causation, the record includes the December 3, 1994, report of the court ordered independent medical examiner, P. Brent Koprivica, M.D. In that report, Dr. Koprivica stated:

> "There is the potential for her bladder hypotonicity to be secondary to over-distension of her bladder from not being allowed to void at work. . . . If factually she was not allowed to take breaks in order to void on a regular basis, I would consider this to be causally related to her employment based on the findings of bladder hypotonicity from over-distension. . . . Her history,

> if accurate, suggests it is a causal consequence of her employment activities for the reasons which are stated."

Dr. Koprivica also opined that the over-distention of the bladder could have occurred outside the workplace if claimant followed the same behaviors at home as she did at work: that is, did not take restroom breaks on a regular basis. However, the record does not indicate that claimant's problems came from any source other than her work or that she failed to timely use restroom facilities outside the workplace. Therefore, the Appeals Board interprets Dr. Koprivica's report to be support for there being a causal relationship between claimant's work and her bladder hypotonicity.

In addition, respondent's own medical expert, Thomas E. Snyder, M.D., agreed upon cross-examination that a problem such as claimant's could have been caused by her job if she was not allowed to use a bathroom facility to empty her bladder on a regular basis.

Claimant offered the testimony of Barry W. Galbraith, D.O., who specifically testified that claimant's hypotonia and loss of urgency were job related.

(6) Nature and extent of disability.

Dr. Koprivica gave a 5 percent whole person impairment on a permanent basis as a residual from bladder hypotonicity. Dr. Snyder did not give an opinion as to claimant's percentage of permanent impairment function. Dr. Galbraith opined that claimant's permanent impairment was 20 percent to the body as a whole. The Appeals Board finds no compelling reason to adopt the functional impairment finding of one medical expert over the other in this case and, accordingly, decides to award permanent partial disability compensation based upon an average of the two ratings in evidence. Therefore, the Appeals Board finds claimant's permanent partial disability is 12.5 percent.

(7) Assessment of missed appointment charge.

The assessment against claimant by the Administrative Law Judge of the $100 charge made by Dr. Koprivica for the missed appointment was reasonable and is approved. The amount charged is within the limits provided by the Workers Compensation Schedule of Medical Fees.

(8) IME

The court ordered independent medical examination by Dr. Koprivica was within the discretion and authority of the Administrative Law Judge. *See* K.S.A. 1996 Supp. 44-510e(a), K.S.A. 44-516, K.A.R. 51-9-6 and Winters v. GNB Battery Technologies, 23 Kan. App. 2d 92, 927 P.2d 512 (1996).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Alvin E. Witwer, dated March 22, 1996, should be, and is hereby, reversed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Frances K. Lenhart, and against the respondent, Koss Construction Company, and its insurance carrier, United States Fidelity & Guaranty Company, for an accidental injury which occurred by way of a series from April 1990 through October 13, 1990, and based upon an average weekly wage of $498.98 for 415 weeks at the rate of $41.58 per week or $17,255.70, for a 12.5% permanent partial disability.

As of June 24, 1997, there is due and owing claimant 349.43 weeks of permanent partial compensation at the rate of $41.58 per week in the sum of $14,529.30 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $2,726.40 is to be paid for 65.57 weeks at the rate of $41.58 per week, until fully paid or further order of the Director.

Claimant is further entitled to all reasonable and necessary medical expenses and unauthorized medical up to the statutory maximum upon presentation of itemized statements verifying same.

Claimant is denied payment by respondent and its insurance carrier of the $100 charge by Dr. P. Brent Koprivica for the missed appointment.

Future medical will be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fees contract is approved insofar as it is not in contravention to K.S.A. 1990 Supp. 44-536.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Richard Kupper & Associates	$1,301.50
Metropolitan Court Reporters, Inc.	379.30

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James M. Sheeley, Kansas City, KS
Patricia A. Wohlford, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director